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No. 90-1392

In The

Supreme Court of the United States

October Term, 1990

WILLIAM E. CURRIER and ROBERT C. BRAUN,

Petitioners,

vs.

CHARLES J. BALDRIDGE and ROBERT D. OSBORN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether petitioners may maintain claims that their arrests were wrongful where probable cause was found to exist by reviewing courts.

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OPINIONS BELOW

The petitioners seek a writ of certiorari from an opinion of the United States Court of Appeals for the Seventh Circuit filed on October 1, 1990 [Petitioners' Appendix, pp. 1-13; 914 F.2d 993 (7th Cir. 1990), Rehearing denied December 4, 1990], which had affirmed a decision and order of the United States District Court for the Eastern District of Wisconsin filed on June 15, 1989 [Petitioners' Appendix, pp. 14-44].

STATEMENT OF CASE

This case involves the arrest of William Currier and the arrest of Robert Braun at the New Berlin Municipal Courtroom on February 19, 1986. As a consequence of the events on that day, Currier was convicted of disorderly conduct on October 10, 1986. On January 30, 1987, in a separate trial, Braun was also convicted of disorderly conduct.

William Currier

On February 19, 1986, William Currier attempted to serve papers upon Sergeant Charles Baldridge for a civil case involving an individual named Nancy Knies. Baldridge was present in the New Berlin Municipal Courtroom serving as a bailiff. When Currier first approached Baldridge, the officer refused to accept the papers Currier presented to him. Later, in a second attempt, Currier approached Baldridge in the courtroom from behind, this time striking Baldridge and announcing, "You're served." After Currier struck Sergeant Baldridge, the officer turned and informed Currier that he was under arrest. The striking of Officer Baldridge was confirmed by independent witnesses.

Later, when Currier was being taken to the police station, he dropped to his knees before a group in the hallway and called out, inciting persons in the gathering crowd. Currier testified that the officers helped him up immediately and never mistreated him or abused him. During the ensuing disturbance, Braun was arrested. Both were prosecuted.

At a probable cause hearing in the Circuit Court of Waukesha County on April 30, 1986, Judge Roger P. Murphy found probable cause for all criminal charges against Currier, and therefore, denied Currier's Motion to Dismiss. As the judge stated:

> The Court is satisfied all three counts set forth in the criminal complaint are supported by facts set forth in the criminal complaint, and the Court would therefore deny the motion to dismiss the complaint on the grounds that the complaint fails to set forth probable cause. The Court finds that the complaint does set forth sufficient facts for a neutral, detached magistrate to have the three counts set forth in the criminal complaint.

Judge Murphy also denied Currier's Motion to Dismiss for unlawful arrest. Consequently, the prosecution was allowed to proceed on all charges. Those charges consisted of one charge of disorderly conduct for the incident where Currier struck Sgt. Baldridge, one charge of obstructing a police officer for running from Sergeant Baldridge rather than submitting to the arrest, and one charge of disorderly conduct for the fall and call he made, which tended to provoke a disturbance.

Currier's case went to trial on October 7, 1986. During the course of the three-day trial, the judge and jury heard testimony from numerous witnesses, seven (7) by the prosecution and fifteen (15) by the defense (including Robert Braun, Al Feustal and William Currier).

At the close of the state's case, Currier moved for a directed verdict and dismissal of the charges against him. Judge Murphy denied the motion and stated:

> The court is satisfied from the testimony that it's heard the state has more than met the burden of proof of prima facie, that there is sufficient evidence to support the charges against the - charges against the defendant, the court finds through the testimony even beyond probable cause as far as this court's concerned.
>
> The motion of the defendant is denied at this time.

At the close of all evidence, Currier again moved for directed verdict and dismissal. The circuit court found that the state had presented sufficient evidence to warrant submission of the charges to the jury; therefore, Judge Murphy denied Currier's motion. The jury returned a verdict of guilty on the second disorderly conduct charge.

Currier availed himself of the appellate procedures of the State of Wisconsin challenging his conviction on 13 different grounds. Two of the unsuccessful grounds for appeal were "no probable cause to arrest" and "insufficient evidence to convict." The Wisconsin Court of Appeals rejected all of his arguments. [Respondents' Appendix pp. A-1-A-9]. Currier's petition for review to the Wisconsin Supreme Court was rejected on June 14, 1988. The judgment of his conviction was entered on August 22, 1988.

Robert Braun

On January 28, 1987, Robert Braun's trial began in the Waukesha County Circuit Court. The counts against him

included obstructing an officer for pushing Sergeant Baldridge while he was taking Currier into custody, disorderly conduct for pushing Baldridge away while Currier was being led through the hallway, resisting an officer while being taken into custody, and criminal damage to property for a hole in the wall of the conference room. The case was litigated in a three-day trial that included four prosecution witnesses and eight defense witnesses (including William Currier, Nancy Knies and Robert Braun). At the close of the state's case, Judge Harry G. Snyder was satisfied that the state had established a prima facie case as to all four of the charges and denied the motion to dismiss. The jury returned a verdict of guilty on the second charge – that of disorderly conduct. Braun's counsel moved for dismissal based on insufficiency of evidence; that motion was denied.

Like Currier, Braun appealed his criminal conviction. His conviction was affirmed by the Wisconsin Court of Appeals on June 22, 1988. [Respondents' Appendix pp. A-10-A-12]. The Supreme Court of Wisconsin denied Braun's petition for review on August 23, 1988.

* * *

Dissatisfied with their results in the state courts, Currier and Braun filed claims in the Federal District Court of the Eastern District of Wisconsin against the arresting officers (Baldridge and Osborn) on February 19, 1989, alleging violations of their Constitutional rights, in four causes of action under 42 U.S.C. Sec. 1983. The respondents answered the Complaint, denying all liability and asserting their entitlement to immunity. After

appropriate discovery, the respondents moved for summary judgment on all counts on March 15, 1989.

On June 15, 1989, the District Court granted summary judgment in favor of the respondents on counts one and two of the plaintiffs' Second Amended Complaint. [Petitioners' Appendix at pp. 14-44]. The petitioners had abandoned their fourth cause of action based on defamation. The petitioners' remaining claims were dismissed by stipulation, with them preserving the right to appeal the decision regarding claims one and two. Count one concerned allegations of infringement on the petitioners' rights secured under the First and Fourteenth Amendments. Count two contained allegations that the respondents arrested the petitioners without probable cause to keep them from exercising their First Amendment rights and in violation of the Fourth and Fourteenth Amendments. Judgment was entered on June 16, 1989 and the petitioners appealed.

On October 1, 1990, the judgment of the District Court granting summary judgment dismissal was affirmed by the Seventh Circuit Court of Appeals [*Currier v. Baldridge*, 914 F.2d 993 (7th Cir. 1990), *reh'g denied*, December 4, 1990].

The petitioners each went through separate trials in their criminal cases. They now attempt to reargue and relitigate evidence presented and decided upon in the Wisconsin State Courts.

SUMMARY OF ARGUMENT

Respondents respectfully submit that this case does not warrant this Court's extraordinary and discretionary consideration. The lower courts have uniformly found no merit in the petitioners' arguments in the wake of two criminal proceedings. Thus, no genuine issue of material fact exists and relitigation of those issues resolved in the state courts is unnecessary. The case presents no conflicts as between the circuits nor any issue not previously resolved by earlier precedent.

Therefore, respondents respectfully request that this Court reject the Petition for a Writ of Certiorari.

ARGUMENTS

I. FINDINGS OF PROBABLE CAUSE PRECLUDE ANY CLAIM FOR WRONGFUL ARRESTS.

In this case, probable cause was found to exist as to the arrests at every judiciary level. The District Court granted Summary Judgment on the issue of probable cause relating to the arrests, and the Seventh Circuit Court of Appeals affirmed that decision. In light of the record, petitioners offer nothing to show the respondents "exceeded" their authority. (Petition at p. 5).

Wrongful arrests are not necessarily committed where convictions are not obtained, if probable cause can be found to exist for the underlying charge. *Baker v. McCollan*, 443 U.S. 137, 145 (1979); *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Once probable cause has been litigated and established, the doctrine of issue preclusion applies.

Under Wisconsin common law, the basis of a defense founded upon issue preclusion is that controlling facts and applicable legal rules remain unchanged, and matters raised are identical to those previously decided in a suit in which there exists a valid and final judgment. *Crowall v. Heritage Mutual Ins. Co.*, 118 Wis. 2d 120, 125-6, 346 N.W.2d 327, 331 (Ct. App. 1984), *pet to rev. denied* 118 Wis. 2d 829 (1984).

Issue preclusion is recognized by the U.S. Supreme Court to relieve parties of the cost and vexation of multiple lawsuits, to conserve judicial resources, to prevent inconsistent decisions and to encourage reliance on adjudications. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Under the doctrine of issue preclusion, once a court has decided an issue necessary to its judgment, that decision precludes relitigation of the issue in subsequent related cases. *Allen*, 449 U.S. at 94.

In this case, the issues of probable cause were litigated. Motions before trial and during the petitioners trials which raised the issue of probable cause were all decided adversely to the petitioners. Thus, the doctrine of issue preclusion will operate to bar an action under 42 U.S.C. Sec. 1983 for wrongful arrest when probable cause has been found to exist in the underlying arrests. *Id.*

Both of the petitioners were convicted of disorderly conduct for the events of February 19, 1986. Currier and Braun have each had their opportunity in court, each submitted numerous motions and each fully defended their cases at trial by calling numerous witnesses. Both petitioners have also availed themselves of the appellate opportunities in the Wisconsin courts. The federal courts

should not serve as an appellate forum for plaintiffs who are dissatisfied with their state court decisions. *Scherer v. Balkema*, 840 F.2d 437, 442 (7th Cir. 1988), *cert denied* 486 U.S. 1043 (1988). ("One fair opportunity to litigate an issue is enough.") As in this case, the plaintiffs in *Scherer* had been convicted and were unsuccessful on appeal. The district court and the Seventh Circuit Court of Appeals in *Scherer* properly saw no need to reconsider the issue of probable cause. *Id.* at 443. Therefore, because the issue of probable cause was conclusively determined in the state courts, the petitioners cannot now relitigate the issue in a federal court. *Allen*, 449 U.S. at 94; *Guenther v. Holmgren*, 738 F.2d 879, 889 (7th Cir. 1984) *cert denied* 469 U.S. 1212 (1985). The petitioners cannot now couch their claim in alleged violations of Due Process simply because they have received an adverse decision at every available judiciary level.

Petitioners' attempt to relitigate issues of credibility must also fail. [Petition at pages 11-15]. The petitioners argued their claims of fraud, fabrication, and perjury on the part of the police officers in their criminal trials, a forum in which they each had every incentive to vigorously litigate these issues. There may have been a difference of opinion on recollections of facts as among all witnesses. However, the testimony of the respondents was supported by independent witnesses. Hence, the prosecution and conviction of each of the petitioners had a basis independent from the testimony of the respondents alone. In reaching their verdicts, petitioners' respective juries necessarily decided the issues of credibility surrounding the incidents which gave rise to their

arrests. Thus, the petitioners are precluded from rearguing the issue of credibility.

II. THE ACT OF SERVING PLEADINGS DOES NOT INSULATE ONE FROM THE CONSEQUENCES OF CRIMINAL VIOLATIONS.

The petitioners are now attempting to wrap themselves in the First Amendment as an excuse for conduct which has been decided by two state courts and two federal courts as conduct that has provided a basis for finding probable cause.

Service of pleadings does not afford First Amendment protection for illegal acts such as disorderly conduct or striking an officer. *United States v. O'Brien*, 391 U.S. 367, 376 (1968), *cert denied* 486 U.S. 1043; *State of Wisconsin v. Minniecheske*, 118 Wis. 2d 357, 360, 347 N.W.2d 610, 611 (Ct. App. 1984), *pet to rev denied*, 121 Wis. 2d 707 (1984). The Constitution of the United States cannot be used as a vehicle for the petitioners to avoid the legal consequences of conduct which exhibits probable cause for criminal activity.

To redefine petitioners' claim, Currier was not arrested for serving process [Petition at pp. 8, 22], Currier was arrested for and charged with disorderly conduct. Thus, the arrest can be characterized not as retaliatory, but rather in response to a reasonable determination that grounds for a disorderly conduct arrest were present.

It should be noted also that Currier was not arrested the first time he attempted to serve Sergeant Baldridge. It was not until he actually struck Sergeant Baldridge that Currier was arrested. As the district court noted:

> . . . the record shows that Currier made two attempts to serve Officer Baldridge. He was arrested after the second attempt only because he struck Officer Baldridge. The First Amendment does not protect illegal acts such as disorderly conduct or striking a police officer merely because the actor claims to be attempting to serve legal papers. (citations omitted).

District Court Decision and Order of 06/15/89 (Petitioners' Appendix at p. 25).

Although the First Amendment protects the right to associate and the right to advocate, the Constitution does not guarantee the effectiveness of such actions. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-5 (1979). The First Amendment protects individuals from retaliation for the exercise of their First Amendment rights to associate and to speak freely and petition openly. *Id.* "But the First Amendment does not impose any affirmative obligation on the government to listen, to respond, or in this context, to recognize the association and bargain with it." *Id.*

In this case, the record does not support a finding that protected conduct was implicated; nor that the arrest was a "retaliation" (Petition at p. 8). As the district court noted:

> The plaintiffs have not produced a scintilla of evidence or even raised a reasonable inference that protected conduct was a motivating factor in their arrests.

District Court Decision and Order of 06/15/86 p. 9; (Petitioners' Appendix at p. 27). If the petitioners have been "unsure" about what they can anticipate concerning activities which give rise to probable cause for criminal

conduct, [Petition at p. 24] this case should satisfy them that these activities may not proceed without consequence.

III. APPROPRIATE APPLICATION OF SUMMARY JUDGMENT STANDARDS LED TO A DISMISSAL OF PETITIONERS' CLAIMS.

Rule 56(b) of the Federal Rules of Civil Procedure provides that summary judgment may be granted where there is "no genuine issue as to any material fact." This Court has held that summary judgment rules do not require the moving parties to produce evidence to negate the non-moving parties' claims. Rather, the non-moving party must sustain its own burden of establishing its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *cert denied* 484 U.S. 1066 (1988).

The petitioners fail to show that the issues central to their claims against Sergeant Baldridge and Corporal Osborn have not been resolved by prior proceedings. Any dispute over any other alleged factual issues is immaterial because "a complete failure of proof concerning an essential element of the non-moving parties' case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. The standards followed by the Federal District Court and the Court of Appeals for the Seventh Circuit specifically track those of this Court and no record for a "departure" has even been suggested. [Petition at pp. 9-10]; *Currier v. Baldridge*, 914 F.2d 993, 996 (7th Cir. 1990), [citing to *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986), *cert denied* 484 U.S. 1066 (1988); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50 (1986)]. There is no "new

standard for probable cause" in this case as the petitioners allege (Petition at p. 15). The lower courts' rulings are merely the logical response to prevent petitioners from continually retrying their case in multiple forums.

The district court recognized that the petitioners had not presented a factual showing to support their First Amendment claims. Moreover, the Court of Appeals for the Seventh Circuit found that the record did not support a finding that the arrests of Currier and Braun were unreasonable or without probable cause. This Court need not look any further than the analysis contained below to conclude that the petitioners continue to pursue a claim without any basis.

The general theme of their petition involves vague allegations and unsupported assertions of protected conduct. The petitioners' claim that the courts did not afford them a fair consideration of "unsworn declarations," associated with their status as "Christian Activists." (Petition at p. 8-10, 17-21). They show nothing to indicate the lower courts "ignored" relevant evidence, (Petition at p. 7) in light of the fact that the petitioners were free to call, and did call, witnesses in the criminal trials. Thus, the petition raises no issue that needs to be considered by this court.

In addition to the lack of merit for these claims, the petitioners procedurally have not laid a foundation for them in the lower courts. These issues could have been raised prior to this petition but they were not so raised. Where no exceptional circumstances are presented, the respondents respectfully submit that this Court not review questions which were neither raised before nor

considered by the United States Court of Appeals for the 7th Circuit. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n.2 (1970).

CONCLUSION

The petitioners have failed to demonstrate a sufficient foundation for their request that this Court grant their petition. For the reason stated in this response and upon the rationale of the lower court decisions, these respondents respectfully request that the Petition For The Issuance of A Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX
OF
RESPONDENTS

No. 87-1746-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM E. CURRIER,

Defendant-Appellant.

(DATED AND RELEASED MAY 11 1988)

APPEAL from a judgment and an order of the circuit court for Waukesha county: ROGER P. MURPHY, Judge.

Affirmed.

BROWN, P.J. William E. Currier appeals from a judgment of conviction on one count of disorderly conduct, contrary to sec. 947.01, Stats. Currier raises thirteen issues challenging his conviction. We reject all of Currier's arguments and affirm.

Currier argues that the trial court acted like an admiralty court, failing to establish jurisdiction over him and not recognizing his challenges to both subject matter and personal jurisdiction.

There is no burden on the court to prove jurisdiction. Here, both subject matter and personal jurisdiction are obvious upon even a cursory review of the record. A court has subject matter jurisdiction if it has the power to hear the kind of action brought. *State v. Olexa*, 136 Wis.2d 475, 479, 402 N.W.2d 733, 735 (Ct. App. 1987). Circuit

courts in Wisconsin are courts of general jurisdiction and have original subject matter jurisdiction over civil and criminal matters not excepted in the constitution or prohibited by law. *Id.*; Wis. Const. art VII, sec. 8. In this case, the criminal complaint alleged violations of secs. 947.01 and 946.41(1), Stats., and set forth sufficient facts to inform Currier of the nature of the charges against him. The actions against Currier are not excepted by the constitution or other law. Therefore, the trial court had subject matter jurisdiction to hear the action. *Olexa*, 136 Wis.2d at 479, 402 N.W.2d at 735.

The trial court also had personal jurisdiction over Currier. Personal jurisdiction assures that the defendant has a sufficient relationship to the jurisdiction exercising authority and that the defendant has notice of the charges. *Id.* at 479-80, 402 N.W.2d at 735. The alleged offenses took place in Wisconsin, thereby subjecting Currier to state prosecution. Sec. 939.03(1)(a), Stats. The action was commenced pursuant to a complaint under sec. 967.05(1)(a), Stats. Therefore the requisites of personal jurisdiction are satisfied. *Olexa*, 136 Wis.2d at 480, 402 N.W.2d at 735-36.

Currier attacks the constitutionality of sec. 947.01, Stats., arguing that it is "vague and overly broad." Our supreme court has previously determined that sec. 947.01 sufficiently identifies the type of behavior which the legislature intended to be contrary to law and that the statute is not subject to attack for vagueness or overbreadth. *State v. Zwicker*, 41 Wis.2d 497, 507-511, 164 N.W.2d 512, 517-19, *appeal dismissed*, 396 U.S. 26 (1969); *see also State v. Maker*, 48 Wis.2d 612, 615-16, 180 N.W.2d 707,

708-09 (1970), *cert. denied*, 401 U.S. 1013 (1971). That decision is binding on this court and therefore we find the questioned statute constitutional. *See State v. Kennedy*, 134 Wis.2d 308, 315, 396 N.W.2d 765, 767 (Ct. App. 1986).

Currier claims that he was denied "the practice of admission to bail," thereby "suppressing" his ability to prepare a defense. This contention is without merit; there was no denial of bail. The record shows that at Currier's initial appearance, the trial court authorized Currier's release pursuant to ch. 969, Stats. The court set a cash bail in the amount of $500 or, as an alternative, a $1,000 signature bond, with conditions on both that Currier advise the court of any address or employment change, that he make all future appearances, and that he comply with all processing requirements of the county jail. Currier stated to the court that "I don't intend to meet those conditions" and remained in jail for twenty-two days, at which time he signed the signature bond. Any delay in Currier's release resulted not from the trial court's actions but from Currier's own refusal to comply with the reasonable conditions set by the court.

Currier next argues that the trial court "ignored" a demand for a John Doe hearing, contending that the hearing would have shown misconduct in office by the arresting police officer. It was determined below that the request for a John Doe hearing was not properly made. Further, the record shows that it was not Currier who requested a John Doe hearing, but rather a third party, whom Currier now on appeal terms his "next friend of court." Currier therefore lacks standing to challenge the court's disposition of the matter. *See Joint School Dist. No.*

l v. Wisconsin Rapids Educ. Ass'n, 70 Wis.2d 292, 302, 234 N.W.2d 289, 296 (1975).

Moreover, a John Doe hearing into the allegations of misconduct in office against the arresting officer would have no relevance to the disorderly conduct charges against Currier. The John Doe hearing would focus on whether the officer acted improperly. Any such finding would have no bearing on whether Currier committed the offense of disorderly conduct.

Currier alleges that his right to counsel was abridged because the trial court failed to obtain a proper waiver of counsel and forced him to proceed with the trial absent counsel. The record indicates that prior to his trial, Currier had two attorneys. The first was an attorney of Currier's own choice. The second was appointed by the public defender's office but was allowed to withdraw due to a "conflict . . . regarding the defense of this matter," and "irreconcilable" differences. Currier was then warned of the upcoming trial date, subsequently appeared *pro se* at two motion hearings, and was again warned at each hearing of the impending trial date.

On the day of the trial, despite these warnings, Currier appeared *pro se*. At voir dire, Currier asked prospective jurors, "[d]oes it bother you in any way that I'm representing myself without an attorney?" He then asked the prospective jurors if they had heard the phrase "he who defends himself has a fool for a client" and asked several jurors for "the reasoning behind why you feel that I would be a fool being my own client." During his opening statement, Currier stated to the jury that he would not get into the reasons for his not having an

attorney "except the cost," and to state that the public defender was not the answer. Then, on the afternoon of the second day of trial, Currier made an oral motion "to dismiss on the grounds that I have not been represented by counsel." The trial court, in the exercise of its discretion, denied the motion.

The right to counsel cannot be manipulated in this manner so as to obstruct the orderly procedure of the courts or to interfere with the administration of justice. *State v. Scarbrough*, 55 Wis.2d 181, 187, 197 N.W.2d 790, 793 (1972). Here, Currier had counsel, but apparently they were unable to provide representation to his liking. Currier was repeatedly forewarned of the pending trial date and advised to seek counsel. When that date arrived, Currier delayed his motion for counsel until the second day of trial. Currier, by his own actions, has waived counsel. *Pickens v. State*, 96 Wis.2d 549, 564-65, 292 N.W.2d 601, 609 (1980). The record reflects that he knew exactly what he was doing and that his choice was made with his eyes wide open – any claim to the contrary is nothing short of ludicrous. *Id.* at 565, 292 N.W.2d at 609.

Currier also argues that the trial court erred in failing to consolidate his case with that of Robert Braun's. Braun was arrested during the disturbance caused by Currier's arrest. The granting or denying of a motion for consolidation is entirely within the sound discretion of the trial court. *State v. Shears*, 68 Wis.2d 217, 234, 229 N.W.2d 103, 112 (1975). Here, Braun's case and motion to consolidate were before a different branch of the circuit court. As a result, the trial court lacked the authority to order the cases consolidated and did not abuse its discretion in denying Currier's motion.

Further, while a defendant possesses many rights – such as trial by jury, the right to counsel, the right to refrain from self-incrimination, the right to due process of law and the right to a speedy trial – Currier has not shown us, and we have not found, authority establishing a defendant's right to joinder or consolidation of cases.

Currier challenges the denial of his motion for pretrial discovery. He claims he was denied access to "specific names and addresses" in the possession of the New Berlin Police Department. Currier's "demands" for discovery took place in the form of written interrogatories, letters, and verbal communications. Such "demands" are not within the purview of sec. 971.23, Stats.,[1] and thus were properly denied. Moreover, the record indicates that the names and addresses in question were readily available to Currier as public records of the New Berlin Municipal Court. It was Currier's obligation to seek out those records, not the obligation of the police to gather and provide him with the requested information. *See State v. Chacon*, 50 Wis.2d 73, 77, 183 N.W.2d 84, 86 (1971).

Currier also alleges that the failure to provide him with these names and addresses constituted the concealment of exculpatory evidence. We are not so persuaded. There is no claim that the district attorney knew the content of the testimony these prospective witnesses might give; consequently, the district attorney could hardly be suppressing evidence. *See id.* at 76-77, 183 N.W.2d at 86.

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[1] The record shows that Currier made requests pursuant to sec. 971.23, Stats., which were readily complied with.

Counts one and three of the criminal complaint charged Currier with disorderly conduct arising out of his acts at the New Berlin Municipal Court. Currier contends that these charges are multiplicious because they arise from a single series of events.

Charges arising from the same general episode are not multiplicious if the acts allegedly committed by the defendant are so significantly different in fact that they may be denominated separate crimes, even though constituting a violation of the same statute. *See State v. Eisch*, 96 Wis.2d 25, 34, 291 N.W.2d 800, 805 (1980).

Count one of the complaint charged Currier with disorderly conduct for his alleged actions of running up behind a police officer in the courtroom and striking that officer in the kidney area with his fist, yelling out "you're served." These actions incited a crowd of twenty to twenty-five onlookers, many of whom were known to Currier, to cheer and yell, creating a disturbance within the court.

Following this episode, Currier was subdued, arrested and placed in a conference room while additional officers were summoned for his transportation to the police department. After these officers arrived, the actions giving rise to count three of the complaint took place. Currier was being led out of the conference room by two officers when he began screaming, fell to his knees, and then began kicking and struggling with the officers. These actions incited the crowd of onlookers to become hostile, shouting obscenities and yelling at the police officers.

From this synopsis of the charges, it can easily be seen that counts one and three of the complaint are so significantly different in fact that they may be denominated separate crimes.

Currier next challenges the sufficiency of the evidence to support his conviction on count three of the complaint and the trial court's denial of his motion to dismiss for lack of evidence at the close of the case. A conviction will be upheld if the evidence adduced, believed, and rationally considered by the jury is sufficient to prove the defendant's guilt beyond a reasonable doubt. *State v. Daniels*, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415 (Ct. App. 1983). We view the evidence in the light most favorable to the state. *State v. Wyss*, 124 Wis.2d 681, 693, 370 N.W.2d 745, 751 (1985).

The evidence shows that while he was being escorted by two police officers, Currier "pretended to go limp" fell to the ground, started to scream and moan, and struggled with the police officers, "kicking like a little kid." Currier's actions took place before the same crowd of twenty to twenty-five onlookers that had previously cheered him when he allegedly struck the police officer in the kidney area. The actions were described as "inciting the other people to come forward to involve themselves with the disturbance that was occurring." As a result of Currier's actions, these people did become excited and began yelling obscenities, "heckling" the police officers, such that the supporters had to be held at bay with a police dog. Even so, one supporter became engaged in a struggle with the police, shoving an officer who was attempting to control Currier. Additional officers then had to be

called to control what one witness described as "a minor riot."

From this evidence, the jury could easily conclude that there was "violent," "unreasonably loud, or otherwise disorderly conduct," which under the circumstances tended to "cause or provoke a disturbance" satisfying the elements of sec. 947.01, Stats. *See* Wis J I – Criminal 1900.

Currier also argues that there was no probable cause to arrest him, that there was jury tampering and that the trial court was biased against him. On each of these issues, Currier has made no argument, instead stating that "argumentation on this issue is held in abeyance."

An appellate court is not a performing bear, required to dance at each and every tune played on an appeal. *State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151, *cert. denied*, 439 U.S. 865 (1978). Issues raised but not argued on appeal or issues raised without reference to legal authority will not be considered. *See State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). A review of the record shows that these issues lack sufficient merit or importance to warrant individual attention. *Waste Management*, 81 Wis.2d at 564, 261 N.W.2d at 151.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 88-0031-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT C. BRAUN,

Defendant-Appellant.

(DATED AND RELEASED JUNE 22 1988)

APPEAL from a judgment and an order of the circuit court for Waukesha county: HARRY G. SNYDER, Judge.

Affirmed.

BROWN, P.J. Robert C. Braun was convicted of disorderly conduct. On appeal, he points to evidence that he was both verbally and physically abusive. The trial court gave a disjunctive instruction, telling the jury that a defendant commits disorderly conduct when engaged in, *inter alia*, violent, unreasonably loud, or otherwise disorderly conduct.

Braun asserts that this disjunctive instruction informs the jury that he can be found guilty either upon his physical acts or his language. He argues that the instruction violates his right to a unanimous verdict because jurors can disagree on which *actus reus* behavior occurred but can still agree on ultimate guilt.

The state notes that there was no objection to the instruction and argues waiver. Based on *State v. Schumacher*, No. 86-0499-CR slip op. (Wis. June 9, 1988), this court agrees with the state.

Up until now, there was a conflict in the law between published decisions of the court of appeals that had been unresolved by our supreme court. In *State v. Olsen*, 99 Wis.2d 572, 582-83, 299 N.W.2d 632, 637-38 (Ct. App. 1980), failure to object to the disorderly conduct instruction at trail as depriving a defendant of his right to a unanimous jury verdict was held to constitute waiver.

However, in two other cases, a different panel of the court of appeals held that the right to a unanimous jury verdict is so fundamental that it can never be waived. *State v. Koput*, 134 Wis.2d 195, 204, 396 N.W.2d 773, 777 (Ct. App. 1986), *rev'd on other grounds*, 142 Wis.2d 370, 418 N.W.2d 804 (1987); *Holland v. State*, 87 Wis.2d 567, 597-98, 275 N.W.2d 162, 177 (Ct. App.), *rev'd on other grounds*, 91 Wis.2d 134, 280 N.W.2d 288 (1979), *cert. denied*, 445 U.S. 931 (1980).

We hold that *State v. Schumacher* has resolved the conflict. That case dealt with a unanimity argument based on allegedly erroneous jury instructions. The court inferentially held that this issue can be waived. What's more, it held that the court of appeals is without discretion to decide the merits when there is waiver. *Id.*, slip op. at 24-25.

Based on *Schumacher*, this court holds that the statements in *Holland* and *Koput* are wrong. Questions regarding the right to a unanimous jury verdict brought about by an allegedly erroneous jury instruction *are* subject to

waiver. There having been no objection to the instructions given here, the issue was waived.

We are forbidden to reach the merits of the issue in our discretion. Defendant's remedy at this point is to petition the supreme court for review since that court alone has the discretion to reach the merits in this case. *See Schumacher,* slip op. at 5 (Abrahamson, J., concurring).

Braun also claims that he was denied due process and a fair trial when the prosecutor improperly cross-examined him about whether other witnesses lied. There was no objection at trial on these grounds. This issue is waived as well.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.